No. 22535 & 22535-A

United States Court of Appeals for the Ninth Circuit

ECONO-CAR INTERNATIONAL, INC.,

Appellant,

vs.

CARL M. TAUTE, d/b/a ECONO-CAR OF BILLINGS,

Appellee.

CARL M. TAUTE, d/b/a ECONO-CAR OF BILLINGS,

Appellant,

vs.

ECONO-CAR INTERNATIONAL, INC.,

Appellee.

Appeal from the United States District Court
for the District of Montana, Billings Division

Answering Brief of Appellee Taute to Brief of Appellant Econo-Car International, Inc.

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SUBJECT INDEX

CITATIONS AND AUTHORITIES

(b) Statement of Jurisdiction.

This is an appeal from the United States District Court for the District of Montana, Billings Division.

We have earlier set forth a statement of jurisdiction of both the federal district court and of this appellate court in a brief filed by Taute as appellant in this case. We adopt that statement of jurisdiction here. Jurisdiction of the federal courts is not disputed by the parties.

We further adopt the statement contained in the brief of Appellant Econo-Car International, Inc. as to jurisdiction, appearing at pages 1 and 2 of that brief.

(c) Statement of the Case.

In this case Econo-Car International, Inc. has appealed to the United States Court of Appeals from the whole of the verdict and judgment entered against it. Carl M. Taute, the plaintiff in the court below, has appealed from the decision as to the Second Claim of his Complaint. Consequently in this appeal which has been assigned Docket Nos. 22535 and 22535-A, Taute is both an appellant and an appellee, as is Econo-Car International, Inc. Therefore, for ease of reference we will in this brief call the respective parties either "Econo-Car" or "Taute" for easier reading.

With respect to this brief, however, Taute is answering as appellee the brief of appellant, Econo-Car.

This action was instituted in the state district court by Taute, upon the filing of his complaint against Econo-Car. The complaint was couched in two claims, the first claim alleging a contract and breach thereof by Econo-Car; the second claim alleged that Taute was induced to enter into a contractual rela-

tionship with Econo-Car through fraudulent deceit. For each claim Taute claimed damages.

The prayer of the original complaint was amended during the course of the trial. The amount of Taute's prayer at the close of all of the evidence in the case upon such amendment was a claim of $32,679.86 (Tr. 265).

This was the total prayed for by Taute with respect to both the first and second claim of his complaint.

Prior to June 28, 1963, Taute was employed in Billings in a managerial capacity with Ryan Grocery Company. He had, a few weeks earlier than June 28, 1963, responded to an advertisement in a local paper. That advertisement had been inserted by Econo-Car and in fact was soliciting possible franchisees to operate a car rental agency in Billings.

In response to the ad, Taute addressed a letter to the box number indicated in the advertisement expressing his interest in such a franchise.

In response to his letter he received some time later a telephone call from a Mr. Burko. As a result of that telephone call Taute, and his wife Rayetta, had two meetings in the Esquire Motel in Billings with Burko and a Mr. Alvarez, whom Burko represented as being on the national sales staff of Econo-Car.

Burko identified himself as Econo-Car's representative and that he was calling Taute in response to his letter. The meetings were worked out as a result of the telephone call (Tr.27).

At the first meeting Burko explained to Taute that Billings had been chosen as a town that could support a car rental operation of the type that Econo-Car had. (Tr. 29) He used a blackboard in the motel room to demonstrate how Taute could

make a profit on a 15 car operation in Billings, using their methods, their tools, resources and instructions (Tr. 29). He produced and gave to Taute a proposed car rental franchise agreement (Tr. 30, 31), the original of which eventually became Exhibit 6 in this action.

Taute took the proposed franchise home with him, studied it for a couple of days and brought it back along with a yellow pad on which he had listed some questions that he wanted to ask in connection with the provisions of the proposed franchise(Tr.44). He asked those questions at a second meeting, again attended by Taute, his wife Rayetta, Mr. Burko and Mr. Alvarez in the same Esquire Motel. The date of this meeting was June 28, 1963.

The proposed franchise agreement was discussed clause by clause between them, with Burko answering his questions with respect to the franchise agreement (Tr.35). At that meeting Taute signed the agreement and a copy. Apparently the agreements were sent to New Jersey for signature by a vice president of Econo-Car and one signed copy was subsequently returned to Taute (Tr.35).

Exhibit 6 is the signed franchise agreement between the parties.

At the time that Taute and Mr. Burko were examining the franchise agreement, before it was signed, Burko made certain false representations respecting what Econo-Car would do if Taute signed the contract. The substance of these conversations were admitted by the Court into evidence. We will be referring to the items of misrepresentation subsequently in this brief and will not refer to them at length here. It is enough to say that the jury, by its verdict, found that representations made by Mr. Burko to Taute were false and that Taute was fraudulently induced

to enter into Exhibit 6 by virtue of those representations.

Taute did not rescind the contract upon learning of the falsity of those representations. Because of certain circumstances that existed at the time he chose to go forward with the contract. This he had a lawful right to do as we will demonstrate later in this brief.

But Taute discovered that even with respect to the contract that he found he had, the defendant breached several important provisions of that written contract. Again these breaches will be discussed fully by us in our argument in this brief and for the sake of brevity we will not set them forth at length here.

The jury, by its verdict, found that the defendant Econo-Car had fraudulently induced Taute to enter into the contract, and awarded him the sum of $6,000.00 on the second claim, which referred to the fraudulent inducement; it further found that Econo-Car had breached the provisions of its contract and awarded damages to Taute on the first claim of $1,052.00.

Thus the jury, by its decision, found the defendant Econo-Car guilty on both claims. Taute, however, has appealed from that part of the judgment which awarded him only $1,052.00 on the breach of contract claim.

The questions involved relate (1) to the validity of statements made by Burko to Taute before the agreement was signed, which Taute contends were properly admitted by the court; (2) the actual breaches of contract as contended for by Taute; and (30 the propriety of the court's instruction on fraud which Econo-Car claims is insufficient and which Taute claims properly covered the subject so far as it went.

(d) Cross-Specifications of Error.

Taute is satisfied with the verdict of the jury and the judgment of the court with respect to the fraud claim, that is, the second claim of the complaint. The verdict on that item was for $6,000.00.

Nevertheless if Econo-Car is successful in attacking that verdict in this appeal, certain matters came up during the trial on which direction from the United States Court of Appeals is necessary in the event of a re-trial. For that reason only, Taute makes the following Cross-Specifications of Error.

1. The court erred in making the following ruling with respect to billboard advertising:

> "THE COURT: (In Chambers) After consideration of the facts shown by the plaintiff's offer of proof taken in open court with the witness on the stand, it is ordered that the plaintiff's motion for permission to argue the problem of the billboards in his opening statement is denied, and the court indicates at that time that if and when evidence as to the billboard matter is offered that objections to it will be sustained * * *."

In connection with this specification of error, the court allowed the offer of proof to be made in the form of direct testimony from the witness Taute on the stand. The offer of proof consists of Transcript pages 5 through 24. For the sake of brevity, we do not repeat in this brief at this point that testimony in full and ask the Court to be excused from the provisions of Rule 18, 2,(d) of the Rule of the United States Court of Appeals, Ninth

Circuit, in this particular. We state that in substance (Tr.10) Econo-Car was to provide billboard and newspaper advertising; that as part of the "institution of an effective and continued sales promotion campaign" promised in paragraph 4C(c) of Exhibit 6 that Econo-Car was to erect seven to ten billboards for a 90 day period in the main traffic arteries around the area of Billings, and provide three full pages of newspaper advertising(Tr. 11).

2. The court erred in refusing Taute's offer of proof, in words and figures as follows:

> "Comes now the plaintiff by the witness now on the stand, Carl Taute, and offers to prove, and by this witness will prove, that following the date February 15, 1965, when he finally closed the business of Econo-Car in Billings he thereafter, subsequently, daily and diligently, in substance, searched for a position or job and was unable to locate or obtain such a job in Billings until the 31st day of May, 1965, when he went to work at his present position.
>
> "Plaintiff also offers to prove that at the time of his termination of employment with Ryan Grocery Company, prior to undertaking the operation of Econo-Car in Billings, he was earning a yearly salary of $12,200, excluding bonuses and other benefits, insurance and so on.
>
> "That the plaintiff so offers to prove."
>
> (Tr.242)

to which the Court sustained the following objection:

"I object to the offer of proof in that it concerns testimony relating to the elements of damages which are not properly allowable under either claim of the complaint. It is irrelevant to any issues in the case."

"THE COURT: The objections to the offer of proof are sustained, and let the record show that this offer of proof is, pursuant to stipulation, deemed to have been made at the time while the witness referred to is on the stand."

(Tr. 243)

(e) Argument

SUMMARY:

Econo-Car has no cause to complain either as to the size of the verdict, or the rulings of the court on admissability of evidence.

The franchise agreement, Exhibit 6, was prepared and printed by Econo-Car. It contained a number of provisions as to what Econo-Car would provide Taute. These provisions were so vague, indefinite and ambiguous that no court could construe, interpret or enforce those provisions without resort to extrinsic or parol testimony as to what the provisions meant.

The trial court limited Taute to parol evidence which would explain indefinite or vague provisions of Exhibit 6. It refused to allow Taute to introduce evidence which the court felt would contradict or vary the terms of Exhibit 6, even though under the law on a fraud claim Taute should have been allowed to do this.

The court, therefore, by its rulings on the admissability of evidence, limited Taute only to such parol evidence as tended to explain provisions of Exhibit 6 that were vague and indefinite and that have been written in the first instance by Econo-Car.

Econo-Car may not complain that Taute did not elect to rescind the contract immediately upon learning of the falsity of Burko's representations. Taute had the right, under the law and the cases, both in Montana and New Jersey, either to rescind the contract at the time of the discovery, or to accept the contract, make the best of his bargain, and pursue Econo-Car for damages for the fraudulent deceit. Taute, as he had a right to do, chose the latter. He did not thereby waive his right to damages for the fraud. The court submitted the question of waiver of damages for fraud to the jury under proper instructions and the jury found against Econo-Car on that question of fact.

With respect to Taute's Cross Specifications of Error in this part of the appeal, if any re-trial of this cause becomes necessary, Taute should be allowed to introduce evidence with respect to representations made to him by Mr. Burko as to billboard advertising; and as a part of his damages, he should be allowed to recover for his enforced idleness by virtue of the acts of Econo-Car from February 15, 1965, until he found a job on May 15, 1965, after diligent search.

ARGUMENT:

Upon studying the issues presented by the pleadings, the rulings made by the court, and the size of the verdict on the first claim, the breach of contract claim, one wonders what prompts Econo-Car to appeal at all.

The court protected Econo-Car with respect to the

fraudulent representations made by Mr. Burko to the fullest extent during the trial. It limited evidence of parol representations by Mr. Burko only to those that were within ambiguities found in Exhibit 6, the franchise agreement. It did not permit any representations made by Burko that would vary or contradict the terms of the franchise agreement, although under a fraud claim such representations would have been admissable under Montana law.

In other words, the trial court gave Econo-Car the full benefit of Kelly v. Ellis, 39 Mont. 597, 104 P. 873 (1909). It refused to give Taute the benefit of the decision in Koch v. Rhodes, 57 Mont. 447, 188 P. 933 (1920) as to admissability of evidence under a fraud claim. The trial court so ruled although in Koch, the Montana Court specifically distinguished Kelly v. Ellis as not being applicable in a fraud case on the admissability of evidence (See 188 Pacific Reporter, page 936).

It is elementary that parol evidence of negotiations or discussions of parties leading up to a contract are admissable to explain its terms, to aid the court in its construction, or to explain vague, indefinite or ambiguous provisions of the contract. This is inherent both in statute law and in decided cases in Montana.

The pertinent Montana statutes are as follows:

> "93-401-17(10521) The circumstances to be considered. For the proper construction of an instrument, the circumstances under which it was made, including the situation of the subject of the instrument, and of the parties to it, may also be shown, so that the judge be placed in

the position of those whose language he is to interpret."

"13-713. (7538) Contracts explained by circumstances. A contract may be explained by reference to the circumstances under which it was made and the matter to which it relates."

"13-308. (7480) Actual fraud, acts constituting. Actual fraud, within the meaning of this chapter, consists in any of the following acts, committed by a party to the contract, or with his connivance with intent to deceive another party thereto, or to induce him to enter into the contract:

1. The suggestion, as a fact, of that which is not true, by one who does not believe it to be true;

2. The positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true;

3. The suppression of that which is true, by one having knowledge or belief of the fact;

4. A promise made without any intention of performing it; or,

5. Any other act fitted to deceive."

"93-401-13. (10517) An agreement reduced to writing deemed the whole. When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be

between the parties and their representatives, or successors in interest, no evidence of the terms of the agreement other than the contents of the writing, except in the following cases:

1. Where a mistake or imperfection of the writing is put in issue by the pleadings.

2. Where the validity of the agreement is the fact in dispute.

But this section does not exclude other evidence of the circumstances under which the agreement was made, or to which it relates, as defined in section 93-401-17, or to explain an extrinsic ambiguity, or to establish illegality or fraud. The term agreement includes deeds and wills, as well as contracts between parties."

"13-310. (7482) Actual fraud a question of fact. Actual fraud is always a question of fact."

The foregoing statutes are all sections from the Revised Codes of Montana, 1947.

As we said, the trial court limited the parol evidence only to that which would explain ambiguities or unclear provisions of the franchise agreement. That franchise agreement had been prepared and printed by Econo-Car. Under casebook law, the provisions thereof were to be construed against Econo-Car. The trial court limited the parol evidence so as to explain only a few of the provisions of the Econo-Car franchise agreement.

Parol evidence of conversations which does not vary the

terms of the written contract is admissable (Stone-Ordean-Wells Co. v. Anderson, 212 P. 853, 66 Mont. 64).

Extrinsic evidence is admissable to show what the parties meant by what they said, but not to show something other than what they said (Peerless Casualty Co. v. Mountain States Mutual Casualty Co. (U.S.C.A., 9th, Mont.) 203 F.2d 268).

In McNussen v. Graybeal (Mont. 1965) 146 Mont. 173, 186; 405 P.2d 447, 454, 455, the Montana Court said:

> "It is well settled law that the question of whether an ambiguity exists is one of law for the court. But where there is a conflict of testimony as to what were the intentions of the party toward the use of the ambiguous word, determination of the true meaning is one of fact for the jury. In National Cash Register Co. v. Wall, 58 Mont. 60, 62, 190 P. 135, the court in construing the word 'special' to be ambiguous said: '* * * indeed without a description * * * aliunde the contract itself, it is difficult to conceive how a jury could understand the meaning of the word 'special' unaided by any account of the circumstances and the conversation leading up to the making of the contract and the meeting of the minds of the parties upon the particulars necessary to its consummation* * * In no other way could the issues the jury were called upon to settle be made intelligible to them'. Further, sections 13-702 and 13-713, R.C.M. 1947 explicitly allow

extrinsic evidence to explain the true intentions of the parties where a word is found to be ambiguous."

In New Home Sewing Machine Company v. Songer, 7 P.2d 238, 91 Mont. 137, the Court said:

"If the language of the agreement is clear, it needs no interpretation; the intention of the parties is to be ascertained from the writing alone (citing cases). Resort may be had to parol evidence in aid of interpretation only when the contract appears on its face to be ambiguous or uncertain. (citing a case and statutes)

"While it is true that the term 'finance plan' is in general use, we are not prepared to say that it has any well-defined or fixed meaning. It is a matter of common knowledge that the finance plan employed in the business world and the distribution and disposal of merchandise are varied, and that the use of the term by one concern would mean one thing, and when used by another would denote something entirely different.

"The meaning of the term used is not so free from doubt that it can be said as a matter of law that it furnishes its own interpretation. That the writing does not contain all of the conditions of the agreement is apparent; resort must be had to extrinsic facts for an explanation of plaintiff's finance plan. The agreement is uncertain and ambiguous and the court ruled correctly in

admitting the evidence."

Having in mind, therefore, the foregoing statutes and decisions of the Montana Court, let us look at some of the provisions of the franchise agreement in this case, Exhibit 6.

In paragraph 4,C,a, the franchise agreement states:

> "ECONO-CAR AGREES:
> * * *
> C. To furnish guidance to the ECONO-DEALER in establishing, operating and promoting the business of renting automobiles with respect to:
>
> a.) the selection of premises for the establishing of places of business."

In that provision of the franchise agreement, what does the word "guidance" mean? How could any court interpret or define the obligations of Econo-Car to Taute under that provision without resort to extrinsic evidence? Is not parol evidence absolutely necessary if any effect is to be given to the quoted provision of the contract?

As a matter of fact, Burko did make statements as to what Econo-Car would do in aiding Taute to select a location for his rental business in Billings. The subject was discussed by Taute and Mr. Burko and Mr. Alvarez before he signed the contract (Tr. 36). In response to Taute's quite natural question as to what the clause meant, Burko responded that Econo-Car had made a survey of Billings under his supervision and had located the three top locations in Billings and that in connection with the establishment of his premises they would send a three man crew in who knew the top places, although Taute would make the final decision as to which of the three he wanted (Tr. 37, 38). Taute further testified:

"Q. When he made that statement to you did you rely on what he was saying?

A. Certainly."

(Tr. 39)

We respectfully submit that the provision with respect to the selection of the place of business was ambiguous in Exhibit 6, that the ambiguity resulted from the language used by Econo-Car and that parol evidence was admissable to explain what that provision meant. Otherwise the jury could not intelligently decide whether the contract had been performed by Econo-Car.

Moreover, this evidence did not vary or contradict or add to the terms of the franchise agreement. It merely explained that agreement. There is no merit therefore to Econo-Car's Specification of Error No. 1 as to this evidence.

Similarly, other evidence was necessary to explain other provisions of the contract. Again let us look at the franchise agreement, Exhibit 6, for another example of ambiguity. It is provided in paragraph 4,C,c.) as follows:

"4.ECONO-CAR AGREES:

* * *

C. * * *

c.) The institution of an effective and continued sales promotion campaign, making available to the ECONO-DEALER sales and promotional aids above and beyond the basic ECONO-DEALER'S kit, as and when such aids are developed by Econo-Car's staff."

Could any court or any jury, looking at that provision, construe, interpret or enforce the obligations of Econo-Car without resort to extrinsic evidence as to what the provision meant? Do the

words "the institution of an effective and continued sales promotion campaign" explain themselves? Certainly not. Something must be added in order to determine what the parties mean by the provision. And here again the Court permitted extrinsic parol evidence, and properly so. With respect to that provision, and as to what it meant, Taute testified that in his conversation with Mr. Burko, Mr. Burko told him that in return for the $6,000 that he was paying for the franchise and as to what it would buy, there would be in addition to the three man crew, three full page newspaper ads in the Billings Gazette to publicize the opening; that the three man crew would work and call on every business which their experience indicated would be a prospect for car rental business (Tr. 40). Further, that in the way of start-up expenses (Tr. 41), Taute testified that Burko said that Econo-Car would spend every cent of that $6,000 franchise fee in getting Taute's operation going(Tr. 42).

Certainly this evidence is only explanatory of what Econo-Car meant with respect to the language "the institution of an effective and continued sales promotion campaign". The Court properly admitted this evidence.

For some reason that we do not fathom, the Court excluded the conversation with respect to both billboard advertising, although it was part and parcel of the same conversation relating to the newspaper ads and the spending of the $6,000 franchise fee. For some reason the Court distinguished between billboard advertising and newspaper advertising in sales promotion campaigns. We have contended of course in our Cross Specification of Error No. 1 that the evidence relating to billboard advertising was also admissable and counsel for Taute should have been allowed

to make reference to it during the opening statement. The verdict of the jury, however, cured the objection.

However, the newspaper advertising was further expanded in Schedule A attached to the franchise agreement, Exhibit 6, for in paragraph 5 there was a provision for announcement advertising ads at the expense of Econo-Car in the local newspaper.

Finally, Econo-Car objects to the admission of evidence respecting the option of deciding the term of the lease of the automobiles. That evidence came about as follows:

In Schedule B, which is attached to Exhibit 6, one finds the "Econo-Car Lease Plan" relating to automobiles to be supplied to Taute by Econo-Car. In Schedule B, in paragraph 2, is found the following language: "Each lease shall run for a minimum period of 12 months to a maximum of 18 months"* * *"The ECONO-DEALER shall execute a standard form of ECONO-CAR LEASE AGREEMENT before delivery of any vehicles."

There is a glaring ambiguity in the quoted provisions of Schedule B. The agreement does not state at whose option, Econo-Car or Taute, or both, will the lease on individual automobiles be terminated between the twelfth month and the eighteenth month. Taute contended that during his conversations with Mr. Burko he was informed that it would be at his option (Tr. 44). Further Mr. Burko gave reasons why Taute would have the option as to the length of term between the twelfth and the eighteenth month (Tr. 44-45). Here again the evidence was certainly admissable to explain what could not be determined from the contract itself -- which party had the right of deciding when the automobiles would be turned in between the twelfth and the eighteenth month. Parol evidence on that point was admissable. It did not

vary the written contract between the parties.

We may note parenthetically, however, that Econo-Car assumed the option right to itself when it presented Exhibit 7 to Taute for signature. In that instrument, the Lease Agreement, it was provided that Econo-Car would have the option of deciding between the twelfth and the eighteenth month, except that if it did it would have to provide Taute with a replacement model of the same current year and model.

We believe that we havedemonstrated by the foregoing that there is no substance to Specification of Error No. 1 posed by Econo-Car.

Since the mentioned items of evidence not only explained the ambiguous portion of the contract, but also provided the basis for Taute's fraud claim, the evidence was sufficient to demonstrate to the jury that Mr. Burko made false representations to Taute with the intention of inducing him to enter into the franchise agreement, and that at the time he made the representations he knew they were false or that they would not be performed, and that Taute relied upon them. Accordingly it was not error to deny the various motions of Econo-Car for non-suit or directed verdict as the case may be, or to refuse to strike the testimony relating to Mr. Burko's conversations. This disposes therefore of Econo-Car's Specifications of Error No. 2, 3, 4, and 5.

The fraudulent promises made by Mr. Burko, therefore, came into the evidence under the rule that ambiguous or vague provisions of contracts may be explained by extrinsic oral evidence Those same items of evidence, however, because they were fraudulent constituted a basis of Taute's first claim for fraud. Econo-Car contends that Taute, upon discovering the falsity of those repre-

sentations, should have immediately rescinded the contract, and that because Taute did not do so he waived his right to damages for the fraud. This, however, is a misconception of the law.

This Court, under Erie applies the law of the forum to cases in the federal jurisdiction. We apprehend that this Court would apply Montana law, as to a tort claim such as one for fraudulent deceit, even though the franchise agreement in this case recited that with respect to the enforcement of the contract, New Jersey law applied. Irrespective of whether Montana law or New Jersey law was applicable, however, the result would be the same in this case with respect to the fraud claim.

In Koch v. Rhodes (Mont. 1920) 57 Mont. 447, 188 P. 933, 937, the Montana Court said:

> "Under our statutes and under the authorities, one who has been fraudulently induced to enter into a contract has the choice of either rescinding the contract by restoring or offering to restore what he has received under the contract, and recover what he has parted with, or he may affirm the contract, keeping whatever property he may have received or advantage gained, or sue in an action for deceit for the damages suffered by reason of the fraud. While the affirmance of the contract precludes him thereafter from rescinding, he may still sue for damages, unless he waives that right. Como Orchard Co. v. Markham, 54 Mont. 438, 171 P. 274.
>
> * * *
>
> "And while by an affirmance of the contract

one may waive, not only his right to rescind, but also his right of action for the deceit, it is only when such intention is clearly manifested that such a waiver will be declared. There is a clear distinction between the waiver of the right to rescind and the waiver of the right of action. This is pointed by Mr. Colley in his work on torts, paragraph 257, as follows:

'The fraud may also be waived by an express affirmance of the contract. Where an affirmance is relied upon it should appear that the party having the right to complain of the fraud had freely and with full knowledge of his right in some form clearly manifested his intention to abide by the contract and waive any remedy he might have had for the deception'." (Emphasis supplied)

Thus a waiver of the right to rescind is not the same as the waiver of a right to pursue damages for the deceit. In an earlier Montana case, Hillman v. Luzon Cafe Company (Mont. 1914) 49 Mont. 180, 142 P.643, where it was contended that alleged representations whether pleaded or not were not admissable because the written contract superseded all prior negotiations between the parties and presumably contained the full text of the agreement, the court held that such representations were admissable saying that the plaintiffs had mistaken the full force of the defendant's position which is that the contract was procured by false representations. The Montana Court further dis-

tinguished in the Hillman case the fact that the representations did not tend to vary or contradict the terms of the written contract. We have that situation here. The false representations did not change the ambiguous terms of the franchise agreement in this case; they simply explained what Taute thought he was getting under those ambiguous terms.

This Appellate Court is not called upon to decide in this case whether fraudulent representations made by a party for the purpose of inducing another to enter into a contract are admissable, even though they vary the terms of the written contract. That is not the case here. The fraudulent representations do not vary in one iota the franchise agreement. The ambiguous terms are Econo-Car's own creation. It cannot complain if its agents, Mr. Burko and Mr. Alvarez, used those ambiguous terms to mislead Taute. All of those cases therefore cited by Econo-Car in its appellant brief to the effect that fraudulent representations which vary the terms of written contracts are not admissable, are of no force here. This Court is not faced with that situation.

New Jersey agrees that a party who is induced by deceit to enter into a contract may affirm the contract and pursue his action for damages on the deceit. In Peder v. Smith (N. J. 1927) 139 A. 23, it is stated:

> "Where a party has paid money on a contract entered into through misrepresentation, he may bring an action for deceit against the party guilty of fraud; he may waive the fraud and sue upon a breach of the original contract; or rescind and recover what he has paid on it."

We turn now to Econo-Car's Specification of Error No. 6 with respect to the instruction of the Court on fraud. Taute contends that this instruction fully comprehended the law on fraud and told the jury what it must find in order to find a verdict in favor of Taute. The Court having properly instructed the jury, it is presumed that the jury did its duty under that instruction.

In Lee v. Stockmen's National Bank, 63 Mont. 262, 283; 207 P. 623 (Mont. 1922), the Court stated:

> "In order to go to the jury the plaintiff must make out a prima facie case embracing the elements of actual fraud, viz.: (1) a representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) his intent that it should be acted upon by the person and in the manner reasonably contemplated; (6) the hearer's ignorance of its falsity; (7) his reliance upon its truth; and (8) his right to rely thereon; (9) his consequent and proximate injury (26 C.J. 1062)."

The trial court in its instruction to this jury included all of these elements within its instruction and properly told the jury what it must find in order to hold Econo-Car guilty of fraudulent deceit. Therefore, there is no merit to Econo-Car's Specification of Error No. 6.

With respect to Econo-Car's Specification of Error No. 7, since the offered instructions are not set out in totidem verbis, pursuant to Rule 18 of this Court, we assume that Econo-Car is not serious about this Specification.

Specification of Error No. 8 of Econo-Car relates to the Court's instruction on insurance.

The evidence is uncontraverted that Econo-Car changed the provisions relating to insurance without the consent of Taute. We have fully expanded on this subject in Taute's brief as appellant before this Court.

Econo-Car's objection here is that Taute was not damaged by the changes in insurance. Econo-Car does not explain how he was not damaged, since it is positive in the evidence that Econo-Car collected $5.00 per month per car or an additional $50 per month for an insurance cost which it agreed under its franchise agreement to bear itself. In paragraph E of Exhibit 6, such insurance was to be provided by Econo-Car "at no additional expense" to Taute. Econo-Car under the evidence in this case did charge additional expense to Taute for the insurance that Econo-Car provided.

Econo-Car is contending under this Specification of Error that Taute was playing no more than he bargained for and therefore he was not damaged. This is not a true statement of the evidence. Under Exhibit 7, the lease agreement, in paragraph 2 of that exhibit, with respect to the charges to Taute for the rental of the automobiles during the lease term, it was provided that any increase or decrease in the rates charged to Econo-Car by the holder (Chrysler Leasing) should be passed on to Taute. When Chrysler Leasing reduced its rates to Econo-Car, Econo-Car in turn passed that reduction on to Taute. But then it added an increase for the cost of insurance. It was not thereby giving Taute what he bargained for in the cost of rental of the automobiles. His bargain was for a rate per month that would increase

or decrease depending upon the rates charged to Econo-Car by Chrysler Leasing. In effect Econ-Car was not passing on to Taute the decrease in the rental rate charged by Chrysler, because Econo-Car was additionally charging Taute the cost of insurance after it had received a rate decrease from Chrysler. It is unfair to contend that in this situation Taute was receiving "what he bargained for" with respect to the rates to be charged him for the rental of automobiles. Taute was entitled to any reduction that Chrysler Leasing granted with respect to those automobiles to Econo-Car. Econo-Car was not entitled, since it was to supply insurance at its expense, to pass on such insurance costs to Taute, irrespective of the increases or decreases that Chrysler Leasing may have granted. There is absolutely no merit, therefore, in Econo-Car's Specification of Error No. 8.

With respect to Econo-Car's Specification of Error No. 9, again we find no cause for complaint as far as Econo-Car is concerned. The record is replete with breaches of the lease term arrangement with Taute, as to turn-in provisions, as to the length of term, as to effective and continued advertising, and as to insurance costs. Taute has fully expanded on these in his Appellant' Brief in this case. The law stated by the Court in its instruction to the effect that if these breaches were not assented to by Taute, he could recover damages therefor, is a correct statement of the law. The Court in this case went awry on the damages that could be recovered, since the trial court refused to regard the actions of the defendant Econo-Car as a repudiation of the whole contract and thus limited the damages that Taute could receive. The jury in this case allowed Taute all of the damages for breach of contract that it could allow under the instructions of the Court

limited as the jury was to consideration of insurance costs, and costs for individual items of damages on the various breaches. Except for the amount of damages which the Court allowed on the breach of contract claimed, it correctly stated the law for the jury, and there is no merit in Econo-Car's objection to that law.

We will close our argument by speaking briefly of the damages that were recovered and the damages that ought properly be allowable to Taute in this case. His verdict, in total, of $7,052.00 is inadequate to cover the damages which he sustained in this case. The verdict does not amount even to one-half of his out-of-pocket expenses, considering the franchise fee, the monies which he invested in the venture, and the operating loss which he sustained during the time that he was an Econo-Car dealer. He was entitled, under each claim, to be fully compensated for his loss.

The measure of damages for fraudulent deceit is set forth in Sec. 58-602, RCM 1947, which provides:

> "58-602. (7574) Fraudulent deceit. One who willfully deceives another, with intent to induce him to alter his position to his injury or risk, is liable for any damage which he thereby suffers."

And again the Revised Codes state:

> "17-401. (8686) Breach of obligation other than contract. For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate for all the detriment proximately caused thereby, whether

it could have been anticipated or not."

Under those statutes, certainly Taute was entitled to all of his out-of-pocket expenses on the fraud claim. The jury awraded him the amount of his franchise fee, the sum of $6,000.00. Certainly his franchise wasn't worth anything to him, when it is considered what additional time, effort, money and investment he had to expend and employ under his arrangement with Econo-Car. The amount of the damages on the fraud claim is acceptable to Mr. Taute. However, he cannot agree that the damages which he received for the breach of contract are adequate. No consideration was given under the Court's instruction on the breach of contract to his actual out-of-pocket expenses or the fact that the accumulated effect of Econo-Car's actions was to prevent him from performing the contract that he thought he had for a car rental agency.

There are parts of the Court's instruction with respect to the breach of contract that were incorrect; we have set them out in Taute's appellant brief in this case. These inaccuracies, however, were not to the disadvantage of Econo-Car; rather they were to its advantage.

Finally we wish to say a word in support of the Cross Specification of Error in this brief of Taute, relating to his offer of proof for the time that he expended. He should have been recompensed for his enforced idleness. It was so held in Navarro v. Jeffries (Calif.) 187 C.A. 2nd 454 -- 5 Cal. Rptr. 435.

(f) Conclusion

We conclude this brief by submitting to the Court that the judgment with respect to the fraud claim should be affirmed and that the judgment with respect to the breach of contract claim

should be returned to the District Court for further proceedings relating only to the issue of damages. There is no need, in the light of the uncontraverted evidence in this case, to go through the breach of contract provisions with another jury.

Respectfully submitted,

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CERTIFICATE

John C. Sheehy, an attorney duly authorized to practice in the United States Court of Appeals for the Ninth Circuit, states as follows:

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing Brief is in full compliance with those rules.

John C. Sheehy

JOHN C. SHEEHY, Attorney for Appellee, Taute

CERTIFICATE OF MAILING

I hereby certify that on the _____ day of May, 1968, I deposited in the Post Office at Billings, Montana, in an envelope securely sealed, with postage thereon prepaid, three copies of the within and foregoing Brief of Appellee, Taute, addressed to George C. Dalthorp, Esq., Crowley, Kilbourne, Haughey, Hanson & Gallagher, 500 Electric Building, P. O. Box 2529, Billings, Montana 59101.

John C. Sheehy

JOHN C. SHEEHY